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No. 97-1337

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Supreme Court of the United States

October Term, 1997

STATE OF MINNESOTA; Minnesota Department of Natural Resources; RODNEY SANDO, Commissioner of Natural Resources; ARNE CARLSON, Governor of Minnesota; RAYMOND B. HITCHCOCK, Assistant Commissioner of Operations, Minnesota Department of Natural Resources,

Petitioners,

vs.

MILLE LACS BAND OF CHIPPEWA INDIANS, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF RESPONDENT COUNTIES IN SUPPORT OF PETITIONER STATE OF MINNESOTA

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QUESTIONS PRESENTED

1. Was the President's 1850 Order effective to revoke the Indians' hunting, fishing and gathering privilege where the 1837 Treaty provided the privilege continued only "during the pleasure of the President"?

2. Did language of the 1855 treaty "fully and entirely relinquish[ing] . . . any and all right, title, and interest, of whatsoever nature . . . in and to any other lands in the Territory of Minnesota" extinguish any remaining hunting, fishing and gathering privilege in Minnesota?

3. Was a hunting, fishing, and gathering privilege, reserved only "during the pleasure of the President," extinguished when Minnesota was admitted to the Union on an equal footing with the original thirteen states?

PARTIES TO THE PROCEEDING BELOW

The "Minnesota counties" of Aitkin, Benton, Sherburne, Crow Wing, Isanti, Kanabec, Mille Lacs, Morrison and Pine, are counties in an area of mid-Minnesota ceded to the United States under Treaty with the Chippewa of 1837 (7 Stat. 536). They were established around the time of Minnesota statehood in 1858.

The State of Minnesota and officials charged with conservation management and enforcement were the original defendants (collectively "Minnesota"). The "Minnesota Counties" intervened in the district court proceeding.

The original plaintiffs below are the Mille Lacs Tribe and some members and officers. We refer to them collectively as "Mille Lacs." They were later joined by the United States.

The Fond du Lac Tribe of Minnesota separate case against state officials was consolidated but did not include the State or United States.

Later intervenors (after decision in "Phase I") were the six Bands from Wisconsin: St. Croix Chippewa Band, Lac Du Flambeau Band, Bad River Band, Sokaogon Chippewa Community, Red Cliff Band and Lac Courte Oreilles Band. These latter Bands are referred to below as the "Wisconsin Bands."

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OPINIONS BELOW

The opinion of the Eighth Circuit, reported at 124 F.2d 904 (1997) is Petition Appendix (hereafter PA) 1. It affirmed *Mille Lacs Band of Chippewa Indians v. Minnesota*, 853 F. Supp. 1118 (D. Minn. 1994) (PA 351); *Mille Lacs Band of Chippewa Indians v. Minnesota*, 861 F. Supp. 784 (D. Minn. 1994) (PA 212), and other district court orders reprinted at PA 74, 164, and 419.

JURISDICTION

The court of appeals opinion was entered August 26, 1997, PA 1. A timely petition for rehearing was denied on November 17, 1997, PA 482, and Petitions for Certiorari filed February 17, 1998, and granted July 8, 1998. A separate Counties' petition, No. 97-1356, is still pending.

CONSTITUTIONAL, STATUTORY, AND EXECUTIVE ORDER PROVISIONS

This case involves U.S. Const., art. II, § 2:

> **Powers of the president.** The president shall be commander in chief of the army and navy of the United States, . . .
>
> He shall have power, by and with the advice and consent of the senate, to make treaties, provided two-thirds of the senators present concur;
>
> . . . .

The case involves statutory provisions including:

1) The Act of June 30, 1834 (4 Stat. 735, now 25 U.S.C. § 9):

> That the President of the United States shall be, and he is hereby, authorized to prescribe such rules and regulations as he may think fit, for carrying into effect the various provisions of this act, and of any other act relating to Indian affairs, and for the settlement of the accounts of the Indian department.

2) Act for the Admission of the State of Minnesota, Act of May 11, 1858, 11 Stat. 285, reprinted PA 515.

3) The Treaty with the Chippewa of July 29, 1837 (7 Stat. 536), reprinted as PA 484; the Treaty with the Chippewa of February 22, 1855 (10 Stat. 1165), reprinted at PA 502, and the Executive Order of President Zachary Taylor of February 6, 1850, reprinted at PA 565.

STATEMENT OF THE CASE

Introduction.

The case was commenced in 1990 by the filing of a complaint by the Mille Lacs Band against the State of Minnesota and its conservation officials. This was nearly a century and a half after the President Taylor's 1850 Order Revoking the 1837 Treaty privilege, and the 1855 Treaty which further ceded all Chippewa interests in lands in Minnesota. The Mille Lacs sought a declaration that 1837 Treaty hunting and fishing "rights" continued and an injunction to prohibit Minnesota from enforcing state laws.

These "Minnesota counties" of Aitkin, Benton, Sherburne, Crow Wing, Isanti, Kanabec, Mille Lacs, Morrison, and Pine intervened. They are all in the area affected, that is; the 1837 Treaty area.

The two principal interests of the Counties were law enforcement and their substantial ownership of public lands, on which the Bands asserted a right to access, hunt and fish without compliance with state (or county) laws.

The Counties feared (correctly) that these interests could be especially affected: "Even if the Band's rights under the 1837 Treaty are limited to public land, a resulting depletion in fish and game stocks. . . . " *Mille Lacs Band of Chippewa Indians v. Minnesota*, 989 F.2d 994, 998 (8th Cir. 1993).[1] The Counties' responsibility for local law enforcement is similarly aggravated by requiring enforcement against their citizens to restrict harvest in favor of Band members.

Finally, the Counties also seek to protect "local and individual interests . . . " since their citizens' way-of-life and economic base were viewed as threatened. *Mille Lacs*, 989 F.2d at 1001.

Historical Background.

The Counties' area of Minnesota was acquired[2] by the United States under a cession Treaty with the

---

[1] This decision granted the Counties intervention, after denial by the District Court.

[2] "Acquired" refers to the extinguishment of Indian claims. The Treaty of Paris of 1783 had partitioned the lands between the United States (colonies) and Great Britain with the Great Lakes as the boundary.

Chippewa of 1837, which provided that "The said Chippewa nation cede to the United States all that tract of country within the following boundaries. . . . " (7 Stat. 536, Petition Appendix (hereinafter PA) 484.)

The treaty proceedings extended over ten days in July 1837, and were attended by more than 1000 Indians, including Chippewa chiefs from eleven Bands, several of whom are recorded speaking and negotiating on behalf of the Indians. Treaty Journal starts at Joint Appendix (hereafter JA) 45.

There were several official interpreters, with at least four directed to make translation between English and Chippewa. Journal, JA 64-65. Reflecting the relative sophistication of the Chippewa "various branches of which" had negotiated numerous treaties,[3] members of the huge Chippewa contingent included numerous persons also capable of interpreting. Traders, missionaries, and Chippewa family members, many bilingual, were part of the throng present, and most were on the Chippewa "side." Nearly fifty Chippewa chiefs and warriors ultimately signed the treaty.

Consistent with his instructions from the United States, Governor Henry Dodge (ex officio, Superintendent of Indian Affairs) first told the Indians that he was to "purchase a small part of your country . . . not valuable for its game, and not suited to the culture of corn. . . . " Journal, JA 45. The Chippewa were to retain other lands

[3] The President's 1849 Report to Congress stated the Chippewas were: "party to no less than twenty nine treaties." JA 145.

to the north and west. (*See* Map of Chippewa cessions 1837-1855, JA 956, reprinted hereto as App. 1.)

An Indian spokesman and chief, Ma-ghe-ga-bo, first expressed reluctance to sell the lands permanently and proposed the alternative of a sixty-year lease of the lands. Journal, JA 73.

The United States negotiator (Governor Dodge) expressly rejected this proposal and any result other than outright sale of the land. He explained specifically that any continued use of the area by the Indians was to be temporary:

> It is proper for me to explain to you that your Great Father never buys land for a term of years. I will agree on the part of the President, that you shall have the free use of the rivers, and privilege of hunting upon lands you are to sell to the United States, *during his pleasure*. . . .

1837 Treaty Journal Proceedings, JA 73-74 (emphasis added indicating language ultimately incorporated into the Treaty). The Treaty Council was adjourned until the next day, allowing the Chippewas to consider this demand and consult among themselves and their advisers. Journal, JA 73-74.

Reconvening at noon another chief, Flat Mouth (Aish-ke-bo-gi-ko-zhe), acted as spokesman for the Chippewa and immediately repeated the request the Indians be allowed to continue to remain on these lands: "Our children are willing to let you have their lands. . . . [but] There is some game on the lands yet; & for that reason also, we wish to remain upon them, to get a living." *Id.*, JA 75-79.

Governor Dodge responded on behalf of the President: "[Y]ou will be allowed, *during his pleasure*, to hunt and fish on them. It will probably be many years, before your Great Father will want all these lands for the use of his white Children." *Id.*, JA 78-79 (emphasis added indicating Treaty language).

Dodge later made clear that the proposed payment and benefits was to be "In full consideration for that part of your country which I wish to buy from you." *Id.*

Though the minutes only show a small part of the proceedings, they clearly reflect that the limiting phrase "during the pleasure of the President" was proposed, translated and discussed during treaty discussions.

The Treaty was ratified by Congress, and the payments and other services were provided and accepted by the Chippewa.

Settlement from across the Country, and around the World, continued to accelerate into the Minnesota territory and into the areas in question. In 1849, Minnesota became a Territory pursuant to Congressional authorization with statehood expected soon. Increasing "civilization" of the area is also reflected in the fact two of these counties were established that same year.

By September, 1849, the Governor of the new Minnesota Territory, Alexander Ramsey, proposed revocation of the privilege to separate the Indians from the settlers. "He argued '[m]uch complaint is made by the settlers about Sauk Rapids, Swan River [etc.] as to the demoralizing effect of the privilege given the Chippewas, in the Treaty of 1837, to hunt and fish upon the lands ceded by

said Treaty.' " Quoted at *Mille Lacs*, 861 F. Supp. at 802, PA 250.

One of the first acts of the new Minnesota Territorial Legislature was a formal petition to the President for revocation of the hunting/fishing privilege:

> Resolved by the Legislative Assembly of the Territory of Minnesota, that to ensure the security and tranquility of the white settlements in an extensive and valuable district of this Territory, the Chippewa Indians should be removed from all lands within the Territory to which the Indian Title has been extinguished, and that the privileges given to them by Article Fifth of the Treaty of July twenty sixth, one thousand, eight hundred and thirty seven, with the Chippewa Indians &c.and Article Second of the Treaty with the Chippewas of the Mississippi October fourth one thousand, eight hundred and forty two, be revoked.

PA 566. (This Petition was also transmitted to Congress.)

The responsible United States officials made similar recommendations, e.g., the 1849 Report of the Commissioner of Indian Affairs noted that "longer residence [of the Chippewa on the 1837 ceded lands] is incompatible with the tranquility and interest of our citizens, who suffer annoyance and loss from their depredation." Pl. Ex. 84, JA 142.

The President and these officials were already dealing with territorial government and expected statehood would soon be granted, with the sovereignty the equal footing doctrine required. This legal understanding underlies the acts of these officials.

President Zachary Taylor responded by issuing an Executive Order expressly revoking the treaty privileges:

> *The privileges granted temporarily to the Chippewa Indians of Mississippi by the Fifth Article of the Treaty made with them on the 29th of July 1837, "of hunting, fishing and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded"* by that treaty to the United States; and the right granted to the Chippewa Indians of the Mississippi and Lake Superior, by the Second Article of the treaty with them of October 4th, 1842, of hunting on the territory which they ceded by that treaty, "with the other usual privileges of occupancy until required to remove by the President of the United States," *are hereby revoked;* and all of the said Indians remaining on the lands ceded as aforesaid, are required to remove to their unceded lands.

Executive Order (February 6, 1850), PA 565, emphasis added.

There is no record of any later Congressional or Presidential action to reinstate the revoked privilege.

In 1854, Congress passed another targeted Act authorizing treating with the Chippewa "for the extinguishment of the title of the Chippewa Indians to the Lands owned and claimed by them." Act of December 19, 1854, 10 Stat. 598, PA 532. The Act directed the President to clear title to lands and to include provision providing reservations for the Chippewa (further authorizing the grant to each adult or head of a family 80 acres of these reservations). The Act made no mention of hunting or fishing. Indeed, it provided:

> The laws of . . . the Territory of Minnesota shall be extended over the Chippewa territory . . . whenever the same may be ceded, and the same shall cease to be "Indian Country,". . . . [except for an exemption from taxing for reserved land and continued federal prohibitions on liquor]

PA 533.

In 1855, representatives of the Chippewa travelled to Washington, D.C. to negotiate this new treaty. They met with a United States delegation, including Indian Commissioner Manypenny, who was implementing the new federal "reservation" policy. The 1855 Treaty was negotiated in a ten-day period from February 12-22, 1855. (Entire Journal is JA 297-356.)

The Chippewa were addressed by Commissioner Manypenny himself who told them that the purpose of these treaty negotiations was the sale of their remaining land in Minnesota (except for the new reservations):

> [H]is object in sending for them was to buy from them a portion of their lands lying in the Mississippi country, which, when the Chippewas become cultivators of the soil like white men, they will not want, or be necessary to their support.

Journal, February 12, 1855, JA 302.

Each Chippewa chief and negotiator repeated this understanding during the negotiations. The main Chippewa spokesman Chief Hole-in-the-Day (Pa-goona-kee-zhig) replied, "Your words strike us in this way. They are very short. 'I want to buy your land.' These words are very expressive – very curt." JA 304.

Another Chippewa chief Flatmouth said, "It appears to me that I understand what you want, and your views from the few words I have heard you speak. You want Land." Journal, JA 309.

The negotiations largely focused on the location of the reservations, the number of acres being sold and the price to be paid the Indians per acre.

A dramatic change was underway and was understood by both sides during the 1855 negotiations. The Chippewa way of life had to change, and this new reservation policy would implement that necessary change. Commissioner Manypenny repeatedly urged the Chippewa to "live like whites."

Hole-in-the-Day, the Chippewa chief, made several speeches admiring the achievements he saw in Washington and indicating that the Chippewa must become more like Whites. "We want to dress like whites. We envy them their comfortable clothing. We want to adopt their habits and customs, and desire to have the means to accomplish it."

On February 21, 1855, Hole-in-the Day stated another important reason the Chippewa must abandon the "chase" as a way of life: "The country is getting scarce of game, and we cannot get along without changing our habits. We have tried the old system, and found it wanting. We should therefore try a new one." Journal, JA 348.

The 1855 Treaty, 10 Stat. 1165 (PA 502), also reflected the failure of the "old system" in that the Chippewa were already deep in debt less than 20 years after the 1837 Treaty had cleared those debts.

At the 1855 negotiations, the Chippewa delegates sought advice from territorial delegate Henry Rice and even asked him to speak for them. Rice's statements on their behalf reflected the same understanding:

> Mr. Rice said they were the first Indians of the North who had expressed a desire to have such measures taken as to induce them to become white men. They were convinced that this was the only thing which can save or satisfy the tribe. They wish to have this means in their own hands like the whites. They desire to become white man. . . .

1855 Treaty Journal Proceedings, JA 309.

In Article 1 of the 1855 Treaty the Chippewa not only ceded the remaining Chippewa lands in northern Minnesota but also ceded *all* other interests in other lands:

> The Mississippi, Pillager and Lake Winnibigoshish band of Chippewa Indians hereby cede, sell, and convey to the United States all their right, title and interest in, and to, the lands now owned and claimed by them, in the Territory of Minnesota . . . [describing] ***And the same Indians do further fully and entirely relinquish and convey to the United States any and all right, title or interest, of whatsoever nature the same may be, which they may now have in, and to, any other lands in the Territory of Minnesota or elsewhere.***

Treaty of 1855, PA 502-503, emphasis added.

Article 2 established the several regional reservations for the Chippewa bands, including a Mille Lacs reservation. That reservation area was selected by the representatives of the Mille Lacs Band (as was true of each Band's reservation).

The change in the Chippewa way of life is also reflected in the treaty provision that instead of wandering in the chase, the reservations were to be the "*permanent* homes of the said Indians." (Article 2). The treaty also provided that the President may assign the reservations in blocks of 80 acres to an adult or head of a family. (Article 2) PA 505-506.

Chippewa change in lifestyle is finally documented in the Treaty agreement to:

> [S]ettle down in the peaceful pursuits of life, commence the cultivation of the soil, and appropriate their means to the erection of houses, opening farms, the education of their children, and such other objects of improvement and convenience, as are incident to well-regulated society;. . . .

Treaty of 1855, Art. 9, PA 513. Provisions were added to enable this transition including construction of roads, farm land to be "ploughed and prepared for cultivation" and farmers and blacksmiths to teach the Chippewa. Art. 3-4, PA 506-511.

Commissioner Manypenny directed or negotiated more than 40 treaties as Commissioner of Indian Affairs during this period, most implementing the new reservation policy (which the Court of Appeals accurately referred to as "Manypenny's reservation policy," PA 289).

The "removal" this policy accomplished was not removal to the west but removal *from* ceded lands *to* permanent reservation homes. Each band here consented to this process – and indeed selected its own reservation "permanent" home.

The subsequent history of the Mille Lacs Reservation is also found in this Court's *United States v. Mille Lacs*, 229 U.S. 498 (1913).

Minnesota became a state in 1857 "on an equal footing with the original states." Act of May 11, 1858, 11 Stat. 285 (PA 515).[4]

Increasing pressures on wildlife, because of populations, market demand and more efficient weaponry, had long been recognized, even back in 1837 when the U.S. negotiators had referred to the lands as "not valuable for game." By 1855, Chief Hole-in-the-Day had expressed concern over diminishing wildlife: "The county is getting scarce of game." JA 322. This problem was also perceived by the fledgling state. The first session of the state legislature passed the first Minnesota conservation laws and expressly applied such laws to Indians when *off* reservation. PA 569-575.

Enforcement of these state conservation laws was slowly extended to "remote" areas such as the area around Lake Mille Lacs. Contemporaneous newspaper articles note the policy being explained to Indians and non-Indians alike by "game wardens." *See* Counties'

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[4] There was *no* disclaimer provision for Indian lands as in some Western states admissions acts. (Contrast *Tulee v. Washington*, 315 U.S. 681, 683 (1942).

Exhibits, JA 526-528, especially The Little Falls Transcript, March 9, 1894 (Counties' Ex. 26) (Game Warden orders Indians and non-Indians to stop killing game and fish for sale during off season); Weekly Transcript, August 3, 1894 (Counties' Ex. 9), JA 509. As the articles indicate, this was controversial because all inhabitants of the counties – not just Indians – were accustomed to unrestricted hunting and fishing.

(Further history of official explanations to the Chippewas that state laws applied to their off-reservation hunting and fishing will be discussed as part of argument.)

Through the decades at the end of the Nineteenth Century and into the Twentieth Century, the Chippewas made numerous petitions to the United States for grievance or payments.[5] *None* alleged that any 1837 Treaty hunting and fishing rights continued (discussed *infra*, pp. 38-39).

The ultimate official consideration of this claim was by a later President, Franklin Roosevelt,[6] who directly responded to a Chippewa claim that special fishing and hunting rights still continued: "the special hunting and fishing privileges temporarily reserved . . . by the above-

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[5] These petitions are separate from the special Court of Claims statute discussed in *United States v. Mille Lacs*, *supra*, and the treaty claims, under the Indian Claims Commission Act, PA 45-52, for which $24 million was later paid.

[6] His administration was generally favorable to the tribes and each of these bands is organized pursuant to legislation it promoted (Indian Reorganization Act, of June 18, 1934. 48 Stat. 984, 25 U.S.C. 461 *et seq.*).

mentioned treaties [the 1837 and 1842 Treaties] were revoked by the order of the President." Letter from President Franklin Roosevelt to Whitebird, PA 576. This understanding generally continued until this case and the U.S. belated intervention in 1993.

Final confirmation of the change in livelihood for the Chippewa is found in Congress' adoption of the Indian Gaming Regulatory Act (hereafter IGRA), 25 U.S.C. § 2701, et seq., and the negotiation of casino Gambling Compacts with all these Bands. The Casinos provide employment for any band member desirous of working there, and millions of dollars in annual profits to each Band.

Procedural History.

The Petitioner State's description is accurate, but the following additions are relevant and important.

The Counties' intervention was prompted by special interests and a view of the State's interest different from those of the State officials herein. Indeed state officials had negotiated a settlement under the threat of this litigation, but "the Legislature did not approve it after a spirited public campaign." *Mille Lacs*, 861 F. Supp. at 840, PA 212 at 349.

The Counties' intervention was originally denied by the district court (per Judge Diane E. Murphy, 140 F.R.D. 390). On appeal, the Counties were ordered intervened. (*Mille Lacs*, 989 F.2d 994.)

Some of the counties have substantial land ownership, and the orders below are specific that those lands – even where the counties had obtained them from private

owners – were subject to the Band claims. 861 F. Supp at 836, PA 119. Indeed, because the harvest of game animals is calculated based on total production in the area but only public lands are accessible to Band hunters, there is real likelihood of over-harvest caused by this concentration of effort. The district court noted this "localized depletion" PA 117, but held state conservation laws cannot be enforced unless "the State put forth specific evidence establishing why the regulation is a measure 'to forestall the imminence of extinction." PA 119.

In this Court, the Counties also have raised an additional Question Presented (pending in companion Petition No. 97-1356) based upon the "moderate living doctrine" enunciated by this Court in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n.*, 443 U.S. 658, 670 (1979). Each Band here owns and operates a gambling casino pursuant to IGRA. Indeed, the two Minnesota Bands have two such casinos each (with profits into the tens of millions a year). The Counties' sealed Appendix in the Court of Appeals includes the proof from the trial court; Expert Reports based on records from the casinos to show that the millions of dollars in profits provide each Band employment and total casino revenues which far exceed the "moderate income" of their neighbors as defined in federal statute. 42 U.S.C. § 5302(20)(A). Under this Court's moderate living doctrine, the tribal allocation (now up to 50%) should be reduced or confined to subsistence and ceremonial harvest. In the event the Court concludes the treaty privilege was extinguished, as argued below, this further question presented need not be addressed.

SUMMARY OF ARGUMENT

The President of the United States had both constitutional and statutory authority to revoke the privilege which the 1837 Treaty limited in duration "during the pleasure of the President." Other acts of Congress delegated plenary authority to the President in such matters of Indian affairs.

The Indians consented to the resulting removal from the ceded lands by agreeing to the 1837 Treaty and accepting its benefits and agreement in later treaties to cede all remaining interests and go to reservations established as "permanent homes."

The 1830 Removal Act allowing Indian tribes to choose to trade their lands east of the Mississippi for other lands west simply does not apply since no such trade was ever proposed to or made with the Chippewas.

The court is bound by the explicit revocation of the treaty privilege by Presidential Order and may not look behind it. A district court does not have jurisdiction to overturn such a Presidential Order 144 years later. If reviewed, the 1850 Order of the President was (is) valid for two reasons. There was abundant "cause" for the revocation in depredations by hunting Indians and real and threatened conflicts with settlers. The President also acted with knowledge of the equal footing doctrine, which generally requires a new state receive unencumbered sovereignty over natural resources and submerged lands (such as Mille Lacs Lake). It was national policy to encourage settlement into this area and create states, and the revocation advanced that policy.

The later 1855 Treaty in which the Indians agreed to "fully and entirely relinquish and convey . . . any and all right, title or interest, of whatsoever nature . . . in, and to, any other lands in . . . Minnesota" extinguished any (arguably) remaining treaty claim. This Court previously held such language extinguishes all remaining claims including hunting and fishing. *Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753 (1985). The authorizing act for that treaty specifically provided that the laws of Minnesota would henceforth apply and all ceded areas cease to be "Indian Country."

The Court has also held a state's police powers over such important matters as conservation of resources vest upon statehood under the equal footing doctrine and are protected by the Constitution. Courts should be reluctant to construe acts of the President (or Congress) to derogate constitutional rights of the States. Only express, permanent federal grants may derogate the state's authority, and such grants in derogation of states must be justified by real national exigency. Neither exists here. The court's order enjoining the State from enforcement of its conservation laws while requiring the State to restrict other citizens is beyond a court's jurisdiction (and relief barred by the 10th and 11th Amendments).

ARGUMENT

I. Treaties, Statutes and Presidential Orders Must Be Implemented in Accordance with Their Clear Language.

This Court has repeatedly held "courts cannot ignore plain language that, viewed in historical context and given a fair appraisal, clearly runs counter to a tribe's later claims." *Klamath*, 473 U.S. at 774.

The clear meaning of treaties and Executive orders cannot be overlooked to remedy alleged historical wrongs:

> [I]f the words used in the treaty of 1866, reasonably interpreted, import beyond question an absolute unconditional cession of the lands in question to the United States free from any trust, that *a court cannot amend the treaty or refuse to carry out the intent of the parties, as gathered from the words used*, merely because one party to it held the relation of an inferior and was politically dependant upon the other, or because in the judgment of the court the Indians may have been overreached.

United States v. Choctaw Nation, 179 U.S. 494, 535 (1900) (emphasis added).

Ruling in an earlier claim by the Chippewa, *United States v. Mille Lacs Band of Chippewa Indians*, 229 U.S. 498 (1913), this Court noted that clear agreements must be enforced by courts:

> *[T]he Indians, no less than the United States, are bound by the plain import of the language of the act*

> *and the agreement*. Not only so, but the act conferred upon the Mille Lacs many very substantial advantages which doubtless constituted the inducement to the adjustment and composition to which they assented.

Id., at 508, emphasis added.

Where the meaning is clear on *its* face, it cannot be overridden by application of other canons of construction which protect Indian interests:

> Finally, we reject the Ninth Circuit's reliance on the familiar rule of statutory construction that doubtful expressions must be resolved in favor of Indians. (citing) There is no ambiguity here which requires interpretation.
>
> *The canon of construction regarding the resolution of ambiguities . . . does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress.*

Amoco Production Co. v. Village of Gambell, 480 U.S. 531, 555 (1987), emphasis added.

II. The President Had Broad Constitutional and Statutory Authority in Treaty Making and Indian Affairs.

The court(s) below simply did not consider the full scope of the President's authority in the subject area of Indian affairs at this time. We start with constitutional sources of Presidential power, then address the statutes (including treaties).

The Executive power of the President is founded, of course, in Article II and includes an element of inherent

or "implied" power, in addition to any authority delegated by Congress. (Laurence H. Tribe, *American Constitutional Law* (2d ed. 1988) § 4-2 at 211).

Professor Tribe generally discusses the President's authority in context of foreign affairs. The authority of the President in Indian affairs is analogous during the historical period in question.[7] There are two constitutional reasons. First, major policies in both areas were determined through the President's shared article II "power, by and with the consent of the Senate, to make treaties . . . " U.S. Const. art. II, § 2.

In addition to the President's constitutional responsibility to assure "laws be faithfully executed," the President is also made "commander-in-chief of the army . . . of the United States" by Article II § 2. Indian affairs were administered by the Army through most of this historical period.

Thus, the President acted in a dual role, explicitly authorized by the Constitution, to negotiate and to administer Indian treaties. The President exercised this broad authority with the frequent express approval of Congress (and its funding) prior to 1871 (*see* n. 7.) as necessary to accommodate our Nation's westward expansion while laying the legal foundation for new states – each with equal footing sovereignty.

A constitutionally shared power may be delegated by Congress to the President "more broadly than it could where its (Congress' delegated) power as enumerated in

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[7] Until Congress abolished treaty-making with Indians in 1871, Act of March 3, 1871, 16 Stat. 566.

Article I defines the totality of federal authority." (Tribe, p. 212, *citing United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936)).

In the early Nineteenth Century, Congress also explicitly delegated power over Indian affairs to the Executive, e.g., Act of June 30, 1834 (now 25 U.S.C. § 9); section 17 of which provided:

> That the President of the United States shall be, and he is hereby, authorized to prescribe such rules and regulations as he may think fit, for carrying into effect the various provisions of this act, and of any other act relating to Indian affairs, and for the settlement of the accounts of the Indian department.

Felix Cohen observed of the laws of June 30, 1834, of which this statute was a part: "[This day] is perhaps the most significant date in the history of Indian legislation. On this day there were enacted the comprehensive statutes, which, in large part, form the fabric of our law on Indian affairs to this day." Felix S. Cohen, *Felix S. Cohen's Handbook of Federal Indian Law* (1986 Original First Edition Reprint) (1942), at 73.

So complete was this delegation of authority to the Executive that the Ninth Circuit noted of this statute:

> [E]ver since these statutes were enacted in the 1830's, they have served as the source of . . . *plenary administrative authority in* discharging the federal government's trust obligations to Indians.

United States v. Eberhardt, 789 F.2d 1354, 1359 (9th Cir. 1986), emphasis added (upholding federal regulation of *on-reservation* fisheries).

Another leading historian of United States Indian Affairs, in his most recent book, has similarly noted the broad discretion of the President:

> The president, again and again, was given discretionary authority in treaties. . . .
>
> Such authority placed in the hands of the president (usually to be exercised by the secretary of war or the secretary of the interior) indicated not only the respect that the Indians had for the Great Father but also the ability of the federal government by means of treaties to set its will as the determining factor in many elements of Indian life.

Francis Paul Prucha, *American Indian Treaties*, pp. 8-9 (1994).

Other acts of Congress authorized the President to treat to extinguish the Indians' claims to the land, and even remove them entirely, e.g., in the 1837 Appropriation Act, Congress had provided funding for treaties:

> for holding treaties with the various tribes of Indians east of the Mississippi river, for the cession of lands held by them respectively, and for their removal west of the Mississippi. . . .

Act of March 3, 1837, 5 Stat. 158, JA 36. Thus, Congress specifically authorized treating for cession of these lands *and* even authorized treaties for removal west of the Mississippi. Congress did *not* require both be done at the same time – or at all with these tribes (in the same Appropriations Act for Creek and Seminole tribes only removal was funded). Indeed, a separate section of the same Act also funded a survey to "ascertain . . . whether

vacant lands (west of Mississippi) be sufficient to accommodate the tribes remaining east of said river." JA 37. As this section of the Act notes, the area was Sioux country, and it was not ultimately deemed advisable to move Chippewa into this area.

The 1837 Treaty provided for cession and later removal from the ceded lands but not for removal west. It is not invalid for that reason, of course. The Chippewas were not removed west because the lands west were occupied by hostile tribes (Sioux) which the United States had sought to separate from the Chippewa for years. (*See*, e.g., the "Great Treaty" at Prairie duChien, Kappler 2:250, dividing the Sioux and Chippewa, "and other Indians.")

The President, with authority to totally extinguish Indian "title," had the lesser-included power to allow a temporary privilege and direct that any such privilege could be limited in duration. Barring some exigency, the equal footing doctrine placed limits on what the President could – or would – carve out of the sovereign interests held in trust for states.

Any question of Presidential authority to revoke the privilege is resolved by the fact that Congress ratified the Treaty of 1837, including the explicit "during the pleasure of the President of the United States" qualifier. The Indians had consented to this condition by signing the Treaty of 1837, after it was explained to them.

The Indians' acceptance of all benefits under the same treaty also works to bar them from challenging any part of the 1837 Treaty. They cannot disavow or retroactively change the Treaty in order to retain a privilege ratified as temporary and convert it to permanent.

It is long too late to remake the bargain struck, and a district court the wrong place (or branch of government) to do so: "The Indians, no less than the United States, are bound by the plain import of the language . . . [which] conferred upon the Mille Lacs many very substantial advantages." *United States v. Mille Lacs*, 229 U.S. at 508.

Given Congress' express desire to quiet title in order to open new lands for settlement, ultimately for new states, it is not surprising that Congress confirmed such authority in the President who would administer the process of granting these lands from the public domain to settlers (and share in Congress' power to grant statehood).

The district and circuit courts erroneously held that the 1837 Treaty created "rights" which the President had no power to revoke. However, the President has constitutional powers in this area, which Congress had confirmed in (now) 25 U.S.C. § 9 and confirmed through ratification of the Treaty of 1837.

III. The 1850 Presidential Order Was Within the Scope of His Authority Confirmed by Congress.

The actions and orders of a President of the United Sta s, as duly elected Chief Executive, are entitled to a "presumption of regularity" in the courts. *AGFE v. Reagan*, 870 F.2d 723 (D.C. Cir. 1989). When the President acts pursuant to an express or implied authorization from Congress, the Executive action is supported by the strongest presumptions of validity. *Dames & Moore v. Regan*, 453 U.S. 654, 668-669 (1981).

Thus, the only basis for finding President Taylor's 1850 order invalid is if he acted "in contravention of the will of Congress." *Id.* The adopted policies of Congress included cession of Indian land, removal of Indians from ceded land, encouraging settlement and private ownership of the land, and ultimately statehood. The President's Order was consistent with all these policies.

After the Order of 1850, no steps were taken in Congress to countermand the President's 1850 Order revoking the privilege, reflecting that the Order was consistent with the policy of Congress. The courts do not have power to reverse this policy; the judiciary is:

> [W]ithout authority to determine the rights of parties upon the ground of justice or fairness, much less, under the guise of interpretation, to depart the plain import of the words of the treaty. . . . [C]*ourt cannot amend the treaty or refuse to carry out the intent of the parties, as gathered from the words used,* merely because one party to it held the relation of an inferior and was politically dependent. . . .

United States v. Choctaw Nation, 179 U.S. 494 (1900), emphasis added.

IV. The President's Order Revoking the Privilege Was Justified.

The "Record" before the President documented problems which justified the 1850 Order revoking the privilege. Settlers were often troubled by actions of Indians hunting and gathering in the 1837 area. The problems ranged from Indians stealing food to Indians killing of

settlers' livestock while "hunting." Some confrontations became violent, even fatal.

These concerns were communicated by and through Minnesota's Governor and its new Territorial Legislature. The same concerns (and recommendation for revocation) were communicated directly by the BIA Commissioner (quoted, p. 7 above).

The President reasonably concluded on that "Record" that it was no longer his "pleasure" that the "temporary" treaty privilege continue. Peaceful relations between settlers and Indians might best be assured by eliminating such practices in the ceded area. Hunting, especially with modern weaponry, had the real potential to result in life-threatening conflict.

The President's 1850 Order also served to advance the national policy of encouraging settlement into Minnesota, quickly leading, as expected, to a new state.

The United States' Circuit Court Brief made a telling concession, by admitting that the Chippewas in 1837 knew that they could continue to hunt and fish only:

> [S]o long as they did not disturb the white settlers. . . . [or] unless they "displeased the President" by interfering with white settlement and use of the ceded land.

U.S. Court of Appeals Br. at 25.

The "Record" before the President supports his determinations that the Indians were "disturbing settlers" and "interfering with settlement and use of the ceded land."

The 1849 report of his Commissioner of Indians Affairs had noted that:

> [L]onger residence [of the Chippewa on the ceded lands] is incompatible with the tranquility and interest of our citizens, who suffer annoyance and loss from their depredation

(quoted in 861 F. Supp. at 803, PA 253). The COIA went on to note that the Chippewa:

> [A]re allowed to hunt and fish therein until notice is given that the privilege must cease and as it is anticipated this requisition will soon be made and the notice speedily given. . . .
>
> . . .
>
> . . . the privilege granted the Chippewas to occupy, for a limited period, the country purchased of them in the treaty of 1837, should terminate.

JA 145.

The President received from the Minnesota Territorial Legislature a resolution to the same effect:

> [T]o ensure the security and tranquility of the white settlements in an expansive and valuable district of this territory, the Chippewa Indians should be removed from all lands within the Territory to which the Indian Title has been extinguished, and [ ] the privileges given to them by Article Five [of the 1837 treaty] and Article Second of the [1842 Treaty] should be revoked.

Minnesota Territorial Resolution of October 11, 1849, PA 566.

This written "Record" before the President was supplemented by other reports of problems from the Territory.

The district court characterized these problems in politically correct terms:

> To be sure the record shows instances of cultural differences where Chippewas and settlers had varying perceptions which lead to misunderstandings. Perhaps the most striking single piece of trial evidence to illustrate this was about glass windows. Settlers regarded them as something to look out of, and the Indians regarded them as something to look into, oblivious to the settlers' concept of privacy. Other examples include Indians' cultural expectation that food be shared with hungry travelers or that animals in the fields constituted game.

861 F. Supp. at 827, PA 315-316.[8] The latter references are to thefts of settlers' produce and food ("expectation food be shared") or killing their livestock ("animals in the field constituted game").

The actual testimony was not only that the Indians did not share settlers' privacy concerns but that their actions threatened and disturbed settlers to deter settlement:

> Q. [By Counties' counsel Johnson] And by the settler it might have been perceived as a Peeping Tom or even worse. But that's just a misunderstanding?
>
> A. Exactly.
>
> Q. But you don't dispute that the settlers might have been disturbed by these kinds of –

[8] Most settlers' windows were not actually of glass.

A. No. That's exactly one of the points I make, that reactions differed according to the individuals involved.

Q. Did you give other examples.

. . .

A. Well, there was a belief among Ojibwe and Dakota people that you shared food with strangers. . . . when some traveler, goes by a house and has a right to enter and ask for food, the people living there have the obligation to help.

And settlers didn't always understand this or believe that sharing should be practiced on such a scale or with strangers, people that they didn't know or had not met before.

. . .

Q. But still they may, or did, report it as disturbing?

A. Some did, yes; not all.

Q. And in your report, pages 4 through 6, 4-7, you refer to some really disturbing anecdotes – 4-6, a man killed; 4-7, two more whites shot, with one wounded. In each of those events, if I understand the thrust of the report, there was a justification or an understanding, an explanation, for how this transpired between the whites and the Indians, is that correct?

A. Not entirely. The problem with some of these incidents, and the problem with many incidents of these encounters, is that we don't know all the details, and we don't always know the native point of view about what actually happened.

Counties' Examination of Band's Expert White, JA 1128-30.

These conflicts became exacerbated as more settlers included immigrants with even less understanding of frontier (or Indian) ways. From 1849 to statehood in 1858, Minnesota's non-Indian population was exploding from 4,000 to 150,000. Direct Examination of Hofsommer, JA 1448.

Before going to Washington at the end of 1849 to make recommendations to the President which included revoking the privileges, Governor Ramsey had toured the area and heard the concerns of settlers: "He was on an information-gathering tour." Counties' Cross of Bands' Expert, JA 1132.

Trial exhibits include contemporaneous correspondence reporting Indian depredation committed against settlers or missionaries and their property or livestock. Ex. D-17-19, 21-22. Even the Bands admitted below that "The most common complaint against Indians on the frontier involved the killing of livestock,. . . . " Wisconsin Bands' Eighth Circuit Br. at 51. The killing of livestock was a matter of particular importance to settlers as the livestock were not only hard to come by but an important source of survival. It occurred while Indians were "hunting" in their ceded areas, and revocation of the privilege was one remedy.

From the President's perspective the "native point of view" could not be the only consideration; there were other national interests to consider. The interests of settlers were surely one consideration, since the Government was holding out the promise of land to entice these settlers from across the Country (or around the World).

V. A Court Does Not Have Jurisdiction to Overturn the 1850 Order of the President.

A district court does not have jurisdiction to undertake review of an Executive Order of the President of the United States (especially 144 years later). The propriety of the President's 1850 Executive Order is a nonjusticiable political question.

Here the courts below reviewed the actions of the President and held he did not have authority to revoke the privileges or did so improperly. That the President was "arbitrary and capricious" or "in excess of his authority" would be the present-day Administrative Procedures Act standard (5 U.S.C. § 701, et seq.) We have shown above the President was justified even applying these current standards. Further, this Court has held that an Order of the President of the United States is *not* subject to such challenge in the courts:

> Out of respect for the separation of powers and the unique constitutional position of the President, we find that textual silence is not enough to subject the President to the provisions of the APA. We would require an express statement by Congress before assuming it intended the President's performance of his statutory duties to be reviewed for abuse of discretion. . . . Although the President's actions may still be reviewed for constitutionality [citations omitted], we hold that they are not reviewable for abuse of discretion under the APA, . . .

Franklin v. Massachusetts, 505 U.S. 788, 800-801 (1992).

There is no grant of jurisdiction to the courts to review or rescind the President's Order here, nor was there any such in 1850.

Indeed the authority from this Court was to the contrary. In the Nineteenth Century, courts strictly respected the constitutional doctrine of Separation of Powers. The nonjusticiability of "political" decisions by the President had been confirmed one year before the 1850 Order in *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849). (*See*, also, *Mississippi v. Johnson*, 4 Wall. 475 (1867), further discussed *infra*).

The "political question" doctrine was much later articulated in *Baker v. Carr*, 369 U.S. 186 (1962). That decision expressed the standards a court should apply to determine nonjusticiability:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing a lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker, 369 U.S. at 217. These considerations militate against court review of President Taylor's 1850 Order.

There is a "textually demonstrable constitutional commitment of the issue to a coordinate political department;" the United States President is charged by Article II with treaty making and as Commander-in-Chief, with implementing.

There are no "judicially manageable standards for resolving . . . [this controversy]." The privilege here expressly lasted only "at the pleasure of the President." Such treaty language provides no standards for a court to apply unlike (arguably) other treaties with explicit language of duration.[9]

The Circuit Court reached a different policy conclusion from that of Presidents Taylor and Roosevelt which shows "a lack of respect due coordinate branches."

This Court had confirmed that courts did not have jurisdiction to review such actions of the President in *Mississippi v. Johnson*, 4 Wall. 475 (1867). The question there, as here, was the jurisdiction of a court to review a President's discretionary acts. The Court resoundingly (and unanimously) rejected the case.

> An attempt on the part of the Judicial Department of the government to enforce the performance of such duties by the President might be justly characterized, in the language of the Chief Justice Marshall, as "an absurd and excessive extravagance."
>
> . . .

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[9] E.g., later 1864 Chippewa treaty discussed in *United States v. Mille Lacs, supra,* provided reservations "so long as they shall not . . . molest the persons or property of the Whites." 229 U.S. at 502.

> . . . we are fully satisfied that this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties;

Mississippi v. Johnson, supra, at 499, 501.

The Court would have dismissed a challenge to the President's Order in 1850. This is still the correct result.

There has only been one comparable challenge against a President who terminated treaty provisions (with a foreign nation). This Court held federal courts did not have jurisdiction to review the action of the President in *Carter v. Goldwater*, 444 U.S. 996 (1979) (granting certiorari and directing lower court to dismiss complaint).

In that case, the Court of Appeals had upheld the President's action with relevant analysis:

> Finally, and of central significance, the treaty here at issue contains a termination clause. . . .
>
> . . . the President's authority as Chief Executive is at its zenith when the Senate has consented to a treaty that expressly provides for termination on one year's notice, and the President's action is the giving of notice of termination.

Carter v. Goldwater, 617 F.2d 697 at 708 (D.C. Cir. 1979).

This Court granted certiorari and ordered the case dismissed. Four justices viewed the question as "political" and therefore non-justiciable. *Carter,* 444 U.S. at 1002. One dissenting justice would have held the court did have jurisdiction and upheld the President as within his constitutional authority.

A recent decision of this Court also confirms that dismissal of the case is required. In *Dalton v. Specter*, 511 U.S. 462 (1994), the Defense Base Closure Act provided the President had absolute discretion to decide "whether to approve or disapprove." *Dalton*, 511 U.S. at 465. Similar discretion is conferred under the 1837 Treaty where the privilege was to continue only "during the pleasure of the President."

In *Dalton*, as here, the challengers had sued others, instead of the President. Ultimately, the lower courts:

> [S]ought to determine whether non-APA review, based on either common law or constitutional principles, was available. . . . In this rather curious fashion, the case was transmuted into one concerning the reviewability of Presidential decisions.

Dalton, 511 U.S. at 471.

Here, the courts below also curiously "transmuted" this case into one considering the reviewability of a Presidential decision (Order of 1850).

The district judge here blithely held:

> [J]udicial review of the validity of a presidential order is appropriate where necessary to resolve a case within the court's jurisdiction.

Mille Lacs, 861 F. Supp. at 828, PA 212, at 316-317. The Circuit Court in a footnote agreed that court review of Presidential orders was appropriate. Fn. 20, PA 23 (rejecting Counties' arguments as to unreviewability).

This Court succinctly rebuffed such assertion of judicial authority:

> But longstanding authority holds that such review is not available when the statute in question commits the decision to the discretion of the President.

Dalton, 511 U.S. at 474.

VI. The Circuit Holding Conflicts with the Interpretation of the President and of the Federal Agency Charged with The Implementation of Indian Policy.

This Court has very recently reiterated the need to "take note of the contemporary historical context and subsequent congressional and administrative references. . . . " *South Dakota v. Yankton Sioux*, 66 U.S.L.W. 4092, 4098 (January 26, 1998).

The most important contemporary evidence is the very language of the President's 1850 Order which referred to the privilege as "temporary" and expressly revoked. This Order, along with the recommendation of the Commissioner of Indian Affairs and of the Territorial Governor which preceded revocation are most probative of the official understanding at the time. E.g., the 1849 COIA had stated the Chippewa:

> [A]re allowed to hunt and fish therein until notice is given that the privilege must cease and as it is anticipated this requisition will soon be made and the notice speedily given. . . .

JA 145.

As the "contemporaneous view of the Executive Officer responsible for administering the statute," President Taylor's interpretation is "entitled to very great respect."

Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana, 472 U.S. 237, 254 (1985). *Accord Watt v. Alaska*, 451 U.S. 259, 272-273 (1981). (*See, also, Yankton Sioux, supra*, at 4099, quoting *Rosebud Sioux v. Kniep*, 430 U.S. 584 (1977) at 602, relying on a Presidential Proclamation as "an unambiguous, contemporaneous statement by the Nation's Chief Executive, of a perceived disestablishment.")

A long history of Federal Executive and Congressional conclusion that there was no continuing treaty privilege here was documented. The explicit conclusion by President Franklin Roosevelt, PA 576, is only the most dramatic example.

Even the Chippewa did not make contrary assertions. Numerous petitions were sent by the Chippewa to the United States through the 19th Century and after state conservation laws had been adopted and were being enforced off reservation. *None* of these petitions asserted that the Chippewas had any continuing right to hunting or fishing based on the 1837 Treaty.

> Q. [by Counties' counsel Johnson] I believe where we left off just before lunch we talking about petitions, numerous petitions, I think you said, that the Mille lacs Chippewa sent to the President of the U.S. over the years. And the years I'm focusing on are '55 through the end of the 19th century, perhaps.
>
> A. Yes.
>
> Q. And you weren't able to give me a figure, but lots?
>
> A. There were lots.
>
> . . .

> Q. In all of these which you have seen, did any of them reference the 1837 treaty or its provision of hunting and fishing privileges?
>
> A. In the petitions, Indians generally do not state which treaty they're speaking of.
>
> Q. Could you just give me a yes or no? Do any of the petitions expressly cite the 1837 treaty?
>
> A. They do not use language that refers directly back to the 1837 treaty?

Counties' Cross of Band Expert McClurken, JA 1216-17.

In 1889, during the Nelson Act negotiations, a Chippewa chief asked U.S. Representative Rice whether any special fishing or hunting privileges remained: "Another thing – about the wild animals. If an Indian wishes to go outside the reservation to hunt deer, will he be allowed to do so in the hunting season?" Rice replied that:

> [I]n regard to hunting deer, that is a matter for the Legislature of the State to determine. You can hunt deer in any event, whenever you find them during the season set apart for hunting; and wherever the white man may hunt your young men will have the same right to do so.

861 F. Supp. at 820, PA 297.

In this Century, inquiries made to the Commissioner of Indian Affairs were meticulously culled from archives and summarized by expert historian (Newell). Note that the Office of Indian Affairs was the federal administrative agency with direct authority over the subject.

In 1913, the Commissioner of Indian Affairs (COIA) concluded state laws "apply with like force to the Indians." JA 1790.

In 1926, a similar COIA noted it was necessary to comply with state law on ceded lands (cited 861 F. Supp. 784, 821 (D. Minn. 1994) (PA 299-300).

In 1929, the Assistant Commissioner responded there was "no treaty . . . whereof . . . the Chippewas . . . of . . . Minnesota have the right to hunt or fish on land ceded . . . without observing state game laws." JA 1803.

The same year, the Indian Commissioner concluded Indians were subject to state game laws. (*Id.* at Vol. 25, p. 8001.)

In 1934, the COIA concluded an off-reservation hunting citation to an Indian was valid (under state game laws). (Cited at 861 F. Supp. at 821, PA 300.)

A later President of the United States, Franklin Roosevelt, reached the same conclusion. PA 576. Surely acting with the advice and research of responsible officials, he specifically held that the 1837 Treaty privilege had been revoked by the 1850 Order of a predecessor President (quoted above, pp. 14-15.)

These consistent conclusions that no hunting/fishing privilege exists, from the federal agency charged with implementing Indian affairs, are entitled to "considerable deference." *Andrus v. Idaho*, 445 U.S. 715, 729 (1980). *Accord National R.R. Passenger Corp. v. Boston & Main Corp.*, 503 U.S. 407, 417 (1992).

This documents over a century of official understanding which was only politically reversed in 1993 when the United States belatedly joined this case.

Others who acted in reliance upon this understanding there was *no* special privilege include the settlers, landowners and citizens of these Counties. This Court has noted the "contemporary historical evidence" should be considered, to avoid a "conclusion [which] would seriously disrupt the justifiable expectations of the people living in the area." *Hagen v. Utah*, 510 U.S. 399, 421 (1994). These justiciable expectations should not now be disrupted by rewriting history and the treaties.

VII. The Treaty of 1855 "Quit Claim" of All Interests Extinguished Any Remaining Privileges.

Article 1 of the 1855 Treaty included a land cession, which, along with payments, provided consideration for reservations "for the permanent homes of the said Indians." The Bands further agreed in the last sentence of Article 1 to:

> fully and entirely relinquish and convey to the United States any and all right, title or interest, of whatsoever nature the same may be, which they may now have in, and to any other lands in the Territory of Minnesota or elsewhere.

Treaty with Chippewa of 1855, 10 Stat. 1165, PA 502.

The 1855 Chippewa Treaty was transmitted to the Senate for ratification by Commissioner Manypenny, who summarized that the Chippewa "cede and convey . . . all the lands owned and claimed by them, in that territory, *and whatever right or interest they may have in other lands in*

common with other Indians, there or elsewhere." Letter, COIA Manypenny to Secretary of Interior McClelland dated February 23, 1855, emphasis added.

The court below ruled the last "quit claim" sentence of Article 1 had no effect. Instead, the circuit court now held that express reference is required to extinguish usufructuary privileges: "The 1855 Treaty is void of explicit language extinguishing the Band's usufructuary rights. . . . " This conflicts directly with this Court's holding in *Oregon Dep't of Fish & Wildlife v. Klamath Tribe*, 473 U.S. 753 (1985) that such language extinguished hunting and fishing rights.

The Eighth Circuit Court had also held in 1980 that this same language extinguished the rights of the Chippewa to hunt and fish from earlier treaties. *Red Lakes Band of Chippewa Indians v. Minnesota*, 614 F.2d 1161 (8th Cir. 1980) (per curiam), *cert. denied*, 449 U.S. 905 (1980). (It is a mystifying omission that the Circuit Court here overlooked its own controlling precedent.)

Several years after the Eighth Circuit's 1980 *Red Lakes* decision, the Ninth Circuit in *Klamath Tribe v. Oregon Fish & Wildlife Dep't*, 729 F.2d 609 (9th Cir. 1984), had also held that the (Klamath) Tribe's hunting and fishing rights continued to exist even after a similar cession where there was no express reference to extinguishing hunting and fishing.[10]

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[10] (Here, the district court relied on *Lac Courte Oreilles Band v. Voigt*, 700 F. 2d 341 (7th Cir. 1983), which in turn had relied on this same Ninth Circuit *Klamath* decision.)

To resolve the conflict between circuits, this Court granted certiorari in *Klamath* and held that, by ceding "all their right, title, and claim," an Indian tribe conveys "whatever special hunting and fishing rights the Indians had previously possessed." *Klamath*, 473 U.S. at 766 and *see* n.23, p. 773. The Eighth Circuit below did not follow the ruling of this Court (or its own precedent).

The effect of the Circuit decision here is also to give *no* effect to the last sentence of Article 1. The Circuit Court conclusion disregarded Canons of statutory construction: "[It is] an elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." *Colautti v. Franklin*, 439 U.S. 379, 392 (1979). One should give effect to all of the words. *See, e.g., Harrison v. Fortlage*, 161 U.S. 57 (1896).

VIII. The Equal Footing Doctrine Requires That No Temporary Right or Privilege Survives Statehood.

The principal purpose of these treaties was to extinguish Indian claims to prepare the way for settlement of the ceded lands and eventually for statehood.

The Minnesota Admission Act expressly recites the constitutional requirement that Minnesota shall be "admitted into the Union on an equal footing with the original States in all respects whatever." Act of May 11,

1858, 11 Stat. 285 (PA 515).[11] Thus, the State of Minnesota has constitutionally-vested ability to enforce conservation laws uniformly as to all persons within their jurisdiction. This power is further protected in states by the Tenth Amendment.

The constitutional equal footing doctrine has been most often applied in the context of state ownership of submerged lands. E.g., *Pollard's Lessee v. Hagan*, 3 How. 212 (1845). It has been recently restated by this Court: "[A] State's title to these sovereign lands arises from the equal footing doctrine and is 'conferred not by Congress but by the Constitution itself.' " *Idaho v. Coeur d'Alene Tribe of Idaho*, 117 S. Ct. 2028, 2041 (1997), quoting *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977).

Historically, the state's "ownership" includes more than submerged lands and was often articulated as including "ownership" of the very fish and wildlife. *Geer v. Connecticut*, 191 U.S. 519 (1896). "Many of the early cases embrace the concept that the states had complete ownership over wildlife within their boundaries . . . " *Baldwin v. Montana Fish and Game Comm'n*, 436 U.S. 371 (1978).

The strict "title" theory of wildlife was rejected in *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 283 (1977): "Neither the States nor the Federal Government . . . has title to these creatures. . . . " *Id.* at 284. The court continued its recognition of "the importance to its people that a

[11] There was no disclaimer in favor of Indian lands as found in Acts for some Western states.

State have power to preserve and regulate the exploitation of an important resource," *Id.* at 284.

The next year, it was repeated:

> Appellants contend that the doctrine . . . [state ownership of wildlife] has no remaining validity. We do not agree . . . [it reflects] the importance to its people that a State had power to preserve and regulate the exploitation of an important resource.

Baldwin, 436 U.S. at 386. *See*, also, Chief Justice Burger concurring: "whether we describe this interest as proprietary or otherwise is not significant." *Baldwin*, 436 U.S. at 392.

These state sovereignty interests over natural resources are protected by the equal footing doctrine and then by the Tenth Amendment once statehood is achieved.

The relief granted here was threatened but rejected in *Coeur d'Alene*. After that tribe's quiet title action was dismissed, the tribe sought injunctive relief to:

> bar the State's principal officers from exercising their governmental powers and authority over the disputed lands and waters, . . . [which] would diminish, even extinguish, the State's control over a vast reach of lands and waters . . . To pass this off as a judgment causing little or no offense to Idaho's sovereign authority and its standing in the Union would be to ignore the realities of the relief the Tribe demands.

Id. at 2040.

The court noted the historical antecedents of "the principle which underlies the equal footing doctrine" and interests therein protected, e.g., "the right of *fishing* in a port or rivers are in common." *Id.* at 2041, quoting Institutes of Justinian, Lib. II, Tit. I, § 2 (T. Cooper transl. 2d ed. 1841). Any granted rights are subject to "the public right, jus publicum, of navigation *and fishing*." *Id.* at 2041, citing *Shively v. Bowlby*, 152 U.S. 1 (1894), emphasis added.

Under the "equal footing" doctrine, the United States holds beds of navigable waters and fish and wildlife resources in trust for future states. There is a *strong* presumption against any pre-statehood grant impinging upon the future state absent "some international duty or public exigency." *Shively*, 152 U.S. at 49-50. Any intent to depart from this constitutional trust for a future state must be "definitely declared or otherwise made very plain." This is true even where Indian claims are involved. *United States v. Holt State Bank*, 270 U.S. 49, 55 (1925); *see also Montana v. United States*, 450 U.S. 544, 552 (1981); *Utah Div. of State Lands v. United States*, 482 U.S. 193, 197-98 (1987).

The 1837 Treaty provision for temporary privilege did not "definitely declare or otherwise make plain" an intent to grant rights in derogation of the trust for the future state of Minnesota. Rules of treaty construction favoring Indians do not overcome the presumption against such a pre-statehood grant. *See Montana*, 450 U.S. at 552-56.

> Indeed, in only a single case – *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970) – have we concluded that Congress intended to grant sovereign lands to a private party. The holding in Choctaw Nation, moreover, rested on the unusual history behind the Indian treaties at issue in that case, and indispensable to the holding was a promise to the Indian Tribe that no part of the reservation would become part of a State.
>
> Choctaw Nation was thus literally a "singular exception," in which the result depended "on very peculiar circumstances."

Utah Div. of State Lands, 482 U.S. at 198.

The state's interest in protecting its natural resources as to off-reservation activities, is as strong for tribal members' conduct as it is for others'. *See, e.g., Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973) ("[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have been held generally subject to nondiscriminatory state law otherwise applicable to all citizens of the State").

State wildlife laws may even be enforced as to Indians *within* a reservation where necessary for conservation. *Puyallup Tribe v. Dep't of Game*, 391 U.S. 391 (1968); *Puyallup Tribe v. Dep't of Game*, 433 U.S. 165 (1977), especially n. 15 at 176.

Where natural resources are involved, the presumption of state jurisdiction over off-reservation activities is especially important today. Increasing public use of those resources raises the very real potential of over-exploitation. The court below approved separate tribal and State regulation but this Court has long rejected this approach. "Such a duality of sovereignty instead of maintaining in each the essential power of preservation would in fact

deny it to both." *New York ex rel. Kennedy v. Becker*, 241 U.S. 556, 563 (1916).

This Court considered an off-reservation hunting provision of the Fort Bridger treaty argued to displace state law in *Ward v. Race Horse*, 163 U.S. 504 (1896). The question was "whether the treaty made by the United States with the Bannock Indians gave them the right to exercise the hunting privilege . . . within the limits of the State of Wyoming in violation of its laws." *Id.* at 507.

The answer the Court said, "will be made plain by an appreciation of the situation existing at the time of the adoption of the treaty, of the necessities which brought it into being and of the purposes intended to be by it accomplished." *Id.*

The *Ward* off-reservation right was "intended to be of limited duration" (163 U.S. at 515). While no reference was made to the right's termination upon statehood, that conclusion flowed naturally by the general understanding that tribal members' off-reservation activities would be subject to the same laws as others. As previously noted, Minnesota's first legislative acts reflected the same understanding, applying conservation laws off-reservation (*infra*, p. 13).

As in *Ward*, the lower court's ruling results in an irreconcilable conflict between the treaty and the Minnesota Statehood Act.

> [T]he United States had called into being a sovereign state, a necessary incident of whose authority was the complete power to regulate the killing of game within its borders. . . .
>
> . . .

> . . . a legislative power vested in all the other states of the Union, a power resulting from the fact of statehood and incident to its plenary existence. . . . the general rule, . . . presupposes that states, when admitted into the Union , are endowed with powers and attributes equal in scope to those enjoyed by the states already admitted,. . . .

163 U.S. at 510-514.

This Court has often held that treaties must be construed to uphold the sanctity of the public faith but this:

> [S]alutary rule should not be made an instrument for violating the public faith by distorting the words of a treaty, in order to imply that it conveyed rights wholly inconsistent with its language and in conflict with the Act of Congress and also destructive of the rights of one of the States."

163 U.S. at 515, 516.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Eighth Circuit below.

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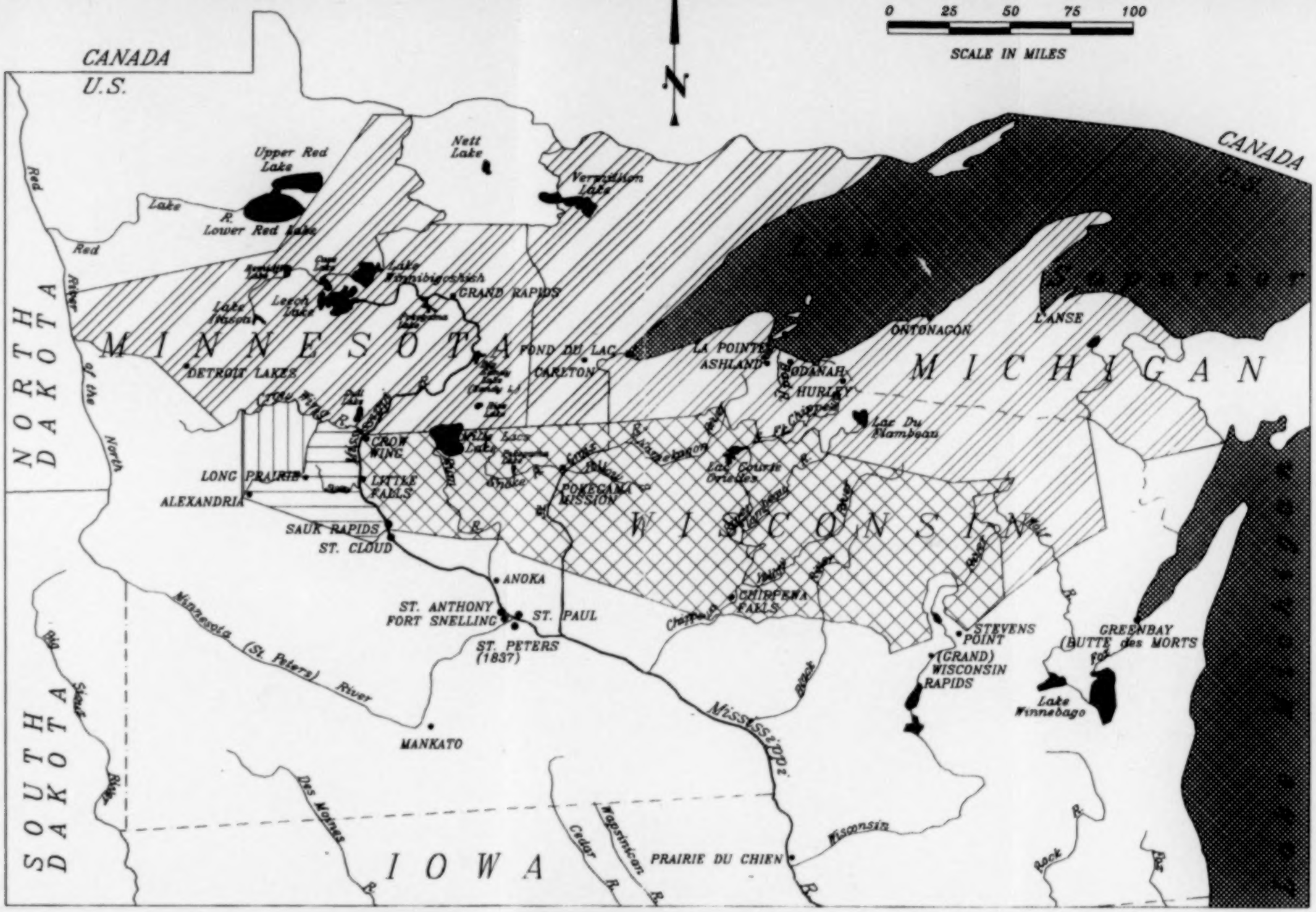
CHIPPEWA LAND CESSIONS, 1837–1855

APPENDIX 1



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